Supreme Court, U.S.
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No. 00-430

In The

Supreme Court of the United States

FORD MOTOR COMPANY and
MAZDA MOTOR CORPORATION,
Petitioners,

v.

CHARLES KING, as Administrator of the Estate of Patti Ann King; AMANDA SUE KING, by and through her next friend Charles King; and ASSOCIATED INSURANCE COMPANIES,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

SAMUEL E. DAVIES *
ATTORNEY AT LAW
TOWNE SQUARE PLACE
230 KNOX STREET
BARBOURVILLE, KY 40906
(606) 546-5196

CARL G. CUNNAGIN
ATTORNEY AT LAW
P.O. BOX 155
MCKEE, KY 40447
(606) 287-7732

Counsel for Respondents

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 1

ARGUMENT 9

CONCLUSION 16

APPENDIX

Appendix A
District Court Memorandum Opinion and Order, 4/30/97 . . . . . 1a

Appendix B
District Court Complaint, 4/14/95 . . . . . 7a

Appendix C
Jury Instructions 14a

Appendix D
Federal Motor Vehicle Safety Standard, 49 C.F.R. § 571.209 . . . . . 17a

TABLE OF AUTHORITIES

FEDERAL CASES

Freightliner Corporation v. Myrick,
514 U. S. 280 (1995) 14

GTE Mobilenet v. Johnson,
111 F 3d 469 (6th Cir. 1997) 10

Geier v. American Honda Motor Company,
120 S. Ct. 1913 (2000) . . . . . *passim*

Hines v. Davidowitz,
312 U. S. 52, 61 S. Ct. 399
85 L. Ed. 581 (1941) 10, 11, 12

Irving v. Mazda Motor Corporation,
136 F. 3d 764 (11th Cir. 1998) 12, 14

King v. Ford Motor Co.,
209 F. 3d 886 (6th Cir. 2000) . . . . . *passim*

Lawrence v. Chater,
516 U. S. 163 (1996) 15-16

Lords Landing Village Condominium Council of
Unit Owners v. Continental Insurance Company,
520 U.S. 893 (1997) 14

Stutson v. United States,
516 U. S. 193 (1996) 14-15, 15

Thomas v. American Home Products, Inc.,
519 U. S. 913 15

FEDERAL STATUTES AND REGULATIONS

15 U.S.C. § 1397(k) (1988 ed.)
recodified at 49 U.S.C. § 30103(e) . . . 1, 9, 13

49 C. F. R. § 571.208 . . . . . 4, 5, 8, 11

49 C. F. R. § 571.209 . . . . . 1, 6

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are a couple of relevant provisions which Ford[1] omits. First, Ford's brief omits a significant provision of the Safety Act, namely 15 U.S.C. § 1397(k) (1988 ed.)[2], commonly known as the "savings clause," which read as follows:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

Further, Federal Motor Vehicle Safety Standard 209, 49 C. F. R. § 571.209, is relevant. The relevant excerpt is contained in Appendix D at 17a.

COUNTERSTATEMENT OF THE CASE

The view that Ford has of this case differs not only from the view of the Respondents (collectively "the Plaintiffs") but also from that of the lower courts, as is amply demonstrated in the Argument herein. Even though the lower courts admittedly did not have the benefit of this Court's decision in *Geier v. American Honda Motor Company,* 120 S.

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[1] Respondents adopt the convention of the Petitioners' brief of referring to the Petitioners collectively as "Ford."

[2] Now codified with a slight change in wording at 49 U.S.C. § 30103(e).

Ct. 1913 (2000), they nevertheless demonstrated a correct understanding of the law but disagreed with Ford on the facts.

With regard to the specifics, Ford stresses the significance of Count II of the Complaint, which was the negligence count. The Complaint (R.[3] 1, Apx.[4] pgs. 31-36) also included the standard strict liability count (Count I) and breach of warranty count (Count III). For the convenience of the Court, the entire Complaint (less the exhibit) is included in Appendix B herein at 7a-13a.

However, the Jury Verdict was not based on the Complaint but on its Instructions. Not only did the Instruction based on Count II (see Jury Instructions, R. 167, Instruction No. 14, Apx. pg. 215, Appendix[5] C at 15a) not include a theory of per se defect, but the Jury was specifically instructed that the choice of options made by Ford was not to be a basis for finding liability. See R. 167, Instruction No. 16, Apx. pg. 216, Appendix C at 15a). Further, the Jury was also instructed with regard to the strict liability count. See R. 167, Instruction No. 13, Apx. pg. 214, Appendix C at 14a. The Jury found for the Plaintiffs on both the strict liability claim and the negligent warnings claim. See Supplemental Jury Verdict, R. 170, Interrogatories No. 1 and 3, Apx. pgs. 230, 232. (The breach of warranty claim was not submitted to the Jury.)

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[3] "R." refers to the record entry number assigned by the Clerk of the District Court.

[4] "Apx." refers to the Joint Appendix filed with the Court of Appeals.

[5] Refers to the Appendix filed with this Brief.

Further, Ford takes Count II out of context. Pursuant to paragraphs 10 and 11 of the Complaint, references in Count II to the Escort referred to this specific vehicle (1992 Ford Escort) and not to vehicles in general. As this Court noted in *Geier* (120 S. Ct. at 1927), the *Amicus Curiae* brief for the government stated that:

> "a claim that a manufacturer should have chosen to install airbags rather than another type of passive restraint in a certain model of car because of other design features particular to that car . . . would not necessarily frustrate Standard 208's purposes."

The essence of Count II (and the rest of the Complaint) was that Ford had "fail[ed] to provide a restraint system which was reasonably safe." As will be seen, Plaintiffs suggested a number of alternative designs for making the system safe, all of which were feasible to implement within the design choice made by Ford.

With regard to the relevant facts, probably the most significant fact about this case is that it is not a case in which the restraint system merely failed to prevent a death that would have otherwise been caused by the accident, but a case in which the restraint system actually caused the death. Although Ford tried to take the position that it was the severity of the crash that caused the death, Steve Syson (Plaintiffs' automotive engineer expert) estimated the total "Delta-V" (sudden change of velocity) to be only about 26 or 27 miles per hour. See R. 185 (Tr.[6], Day 2), pgs. 111-12, Apx. pgs. 641-42. By contrast, as Ford's expert Michelle

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[6] "Tr." refers to the transcript of the trial.

Vogler conceded, the government crash tests are conducted at 30 and 35 miles per hour (R. 188 (Tr., Day 5), pg. 78, Apx. pg. 1207), and the restraint system used in the vehicle (a shoulder belt and knee bolster) should be safe in a frontal collision even with a Delta-V of 35 miles per hour (*Id.*, pgs. 77-78, Apx. pgs. 1206-07). Further, Dr. James Lafferty (Plaintiffs' biomechanical engineer expert) testified that it was the force of Mrs. King's body against the shoulder belt that caused her death (R. 187 (Tr., Day 4), pg. 45, Apx. pg. 987).

Also, it is significant that the collision in this case was a frontal collision which occurred when another vehicle turned directly in front of the subject vehicle in which Patti King was riding. See testimony of Ginger Brockman (the driver of the subject vehicle), R. 184 (Tr., Day 1), pgs. 86-87, Apx. pgs. 478-79. This is significant since under the restraint system option chosen by Ford, Standard 208 (49 C.F.R. § 571.208) required that frontal crash protection be provided by a "passive" restraint system (one that required no action by the occupants). See the Court of Appeals Opinion herein, *King v. Ford Motor Co.*, 209 F. 3d 886, 891-92 (Ford's Appendix at A-22 and A-23).

The Federal Motor Vehicle Safety Standards ("FMVSS") do not specify the specific components to be utilized to comply with the option chosen by Ford (a totally passive system for frontal collisions). Ford chose to use an automatic shoulder belt for restraining the upper part of the body and a "knee bolster" for restraining the lower part of the body. (The "knee bolster" for the right front passenger was the lower part of the dashboard or the glove box door. See testimony of Mr. Syson, R. 185 (Tr., Day 2), pg. 156, Apx. pg. 686.) A knee bolster is nowhere mentioned in the FMVSS. As the Court of Appeals recognized (209 F. 3d at 892, Ford's Appendix at A-23 and A-24), under Plaintiffs'

theory of the case, the problem with the restraint system was not the option or Ford's choice for implementing the option, but that the specific design of the components in the system in this particular vehicle wasn't safe.

The restraint system involved in this case had one basic flaw -- it permitted excessive "shoulder belt loads" the force of the human body against the shoulder belt in a crash. See testimony of Mr. Syson, R. 185 (Tr., Day 2), pg. 138, Apx. pg. 668; and testimony of Dr. Lafferty, R. 187 (Tr., Day 4), pgs. 42-43, Apx. pgs. 984-85.

Within the option chosen, Plaintiffs' experts suggested four separate alternative designs to make the restraint system safer for frontal collisions, namely, incorporating some form of "load-limiter" in the shoulder belt, moving the shoulder belt anchor further back, moving the "knee bolster" closer to the knees of the front seat passenger and, finally, having stronger warnings and reminders directed to the front seat passenger to encourage use of the lap belt. All of the alternatives were feasible to implement within the design choice chosen by Ford for protecting against frontal collisions -- an automatic shoulder harness with a knee bolster. With regard to the alternatives suggested, the FMVSS are silent with regard to the location of the shoulder belt anchor (for a "passive" system), are silent with regard to the knee bolster, are silent with regard to warnings and reminders to fasten the lap belt *directed to the front seat passenger,* and are silent with regard to sun visor warning labels for *both* the driver and the passenger, a significant aspect of the Plaintiffs' case. (The FMVSS do regulate dashboard warning lights and buzzers or chimes directed to the driver. See Standard 208 (49 C.F.R. § 571.208), Sections 4.5.3.3(b) and 7.3(a).) Further, the FMVSS did recognize the need for and efficacy of the use of load-limiters. Specifically, Section 4.5 of

Standard 209 (49 C.F.R. § 571.209) provides for load-limiters which are defined in Section 3[7] as being "a seatbelt assembly component or feature that controls tension on the seatbelt to modulate the forces that are imparted to occupants restrained by the belt assembly during a crash."

As indicated, the first alternative suggested was to incorporate some form of "load-limiter" in the belt. Mr. Syson testified that there were a number of different designs for load-limiters which were feasible and, in fact, were being utilized in other vehicles (R. 185 (Tr., Day 2), pgs. 143-152, Apx. pgs. 673-682); that such load-limiters would, depending upon the design chosen, reduce the belt load anywhere from 20% (*Id.*, pg. 147, Apx. pg. 677) to 50% (*Id.*, pg. 151, Apx. pg. 681); that load-limiters would work regardless of whether or not the lap belt was used (R. 186 (Tr., Day 3), pg. 29, Apx. pg. 739); and that the use of a load-limiter was probably the best way to reduce the risk of serious injury (*Id.*, p. 212, Apx. pg. 922).

The second alternative was to move the shoulder belt anchor back so that it would be behind the passenger. See testimony of Mr. Syson, R. 185 (Tr., Day 2), pgs. 155-56, Apx. pgs. 685-86 and R. 186 (Tr., Day 3), pgs. 211-12, Apx. pgs. 921-22. Indeed, Roger Maugh, one of Ford's experts, admitted that this vehicle could not be sold in Canada because the shoulder belt anchor was too far forward to comply with Canadian design regulations. See R. 189 (Tr., Day 6), pgs. 85-86, Apx. pgs. 1379-80. Again, as previously noted, the FMVSS do not regulate the positioning of the anchor.

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[7] The relevant part of Section 3 is included in Appendix D herein at 17a.

The third alternative suggested was to move the "knee bolster" closer to the knees of the front seat passenger. Mr. Syson testified that the farther away the knee bolster was from the right front passenger's knees, the higher the shoulder belt load would be (R. 185 (Tr., Day 2), pg. 157, Apx. pg. 687); that the purpose of the knee bolster was to balance the load between the pelvis and the chest *(Ibid);* that according to an internal Ford document (Plaintiffs' Exhibit 111), Ford's own engineer recommended a couple of months before the manufacture of the subject vehicle that 100 mm was the maximum distance recommended between the knee and the knee bolster in order to reduce the potential for a lower rib cage organ injury (R. 186 (Tr., Day 3), pgs. 34-36, Apx. pgs. 744-46); that Ford's own seating arrangement drawing of a 1992 Escort (Plaintiffs' Exhibit 129) depicted more than 100 mm between the front of the lower leg and the knee bolster *(Id.,* pgs. 30-31, Apx. pgs. 740-41); that the National Highway Traffic Safety Administration tests on the 1991 Escort[8] (Plaintiffs' Exhibit 76) depicted 120 mm or more between the knees and the knee bolster (*Id.,* pgs. 32-33, Apx. pgs. 742-43); that the test utilized a dummy representing an average (50th percentile) male (*Id.,* pg. 34, Apx. pg. 744); and that a properly designed knee bolster would make it unnecessary for the lap belt to be fastened to avoid serious injury as the necessary pelvic restraint could be supplied by either a properly designed knee bolster or by the lap belt (R. 185 (Tr., Day 2), pg. 154, Apx. pg. 684). Again, as previously noted, the FMVSS do not regulate the positioning

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[8] The Escort was redesigned beginning with model year 1991 with the 1992 Escort having the same basic design as the new 1991 Escort. See testimony of Mr. Syson, R. 185 (Tr., Day 2), pg. 131, Apx. pg. 661.

of the knee bolster (and in fact do not even mention the knee bolster).

The fourth and final alternative suggested was to have stronger warnings and reminders directed to the front seat passenger to encourage use of the lap belt. (The warnings issue was significant because, although as noted above, Standard 208 (49 C.F.R. § 571.208) contemplated that under the option chosen by Ford, the restraint system would be safe in frontal collisions without requiring any action by the vehicle occupants, it in fact was not.) Kenneth Laughery, Plaintiffs' warnings expert, testified with regard to this matter that he had published studies regarding people's use of the various seat belt systems and the perception of hazards associated with the usage, or non-use, of the systems (R. 186 (Tr., Day 3), pg. 59, Apx. pg. 769); that according to a Ford document (Plaintiffs' Exhibit 257), a human factors group at Ford in 1985 proposed a stronger warning for the sun visor to encourage use of the lap belt but the proposal was rejected (*Id.*, pgs. 81-82, Apx. pgs. 791-92); that the warning system in the subject motor vehicle was not adequate to warn and instruct the front seat passenger occupants concerning fastening the manual lap belt (*Id.*, pg. 83, Apx. pg. 793); and that he had developed proposed adequate warnings to warn and remind passengers to fasten the lap belt for a vehicle with a restraint system like in the Escort (*Id.*, pgs. 101-04, Apx. pgs. 811-14). In addition, Ford's expert, Roger Maugh, was forced to admit that prior to the manufacture of the 1992 Escort, Ford had published worldwide design requirements for visor warning labels and that the labels for the 1992 Escort, which was known as a "CT-20", did not comply with those requirements. See R. 189 (Tr., Day 6), pgs. 89-91, Apx. pgs. 1383-85. Finally, Dr. Lafferty testified that Mrs. King would have survived the accident with very limited

injury if she had used the lap belt. See R. 187 (Tr., Day 4), pg. 44, Apx. pg. 986.

The issue of visor warnings is significant in the context of preemption. As previously noted, the FMVSS regulations pertaining to warnings regulate only dashboard lights and chimes or buzzers and are silent with regard to visor warnings. Nevertheless, even though visor warnings are not required by the regulations, Ford's own documents show that not only are such warning labels needed for the restraint system to be safe, but also that the warning labels used in this case were inadequate. If the savings clause (quoted on page 1 herein) is not applicable to such a case in which there is obviously no conflict with the FMVSS, when would it be applicable?

ARGUMENT

The argument made by Ford on pages 3 and 4 of its brief -- that the Plaintiffs allegedly generically attacked the design choice made by Ford and, specifically, that Count II reflected such a generic attack -- is not new. This argument was fully presented to the District Court and the Court of Appeals, but was rejected. With regard to the testimony about Mrs. King being lulled into a false sense of security, it should again be noted that under the design choice made by Ford, Mrs. King should, indeed, have been secure in this frontal collision without fastening her lap belt, but due to the design defects previously noted -- failure to utilize a load-limiter and/or failure to move the shoulder belt anchor back and/or failure to move the knee bolster closer to the knees of the front seat passenger -- she was not secure without fastening her lap belt. Thus, the testimony was consistent

with the federal regulations in this particular case and not in conflict.

Further, the ruling of this Court in *Geier* that "no airbag" claims are pre-empted by federal law is not new – as this Court recognized in *Geier* (120 S. Ct. at 1917), "[a]ll of the Federal Circuit Courts that have considered the question . . . have found pre-emption." Indeed, the District Court in the case at bar ruled, on the basis of those Circuit Court decisions, that any claim by the Plaintiffs in this case that the vehicle in question (a 1992 Ford Escort) was defective for failure to have airbags, was preempted. See *Memorandum Opinion and Order* (granting motion for partial summary judgment), R. 113, Apx. pgs. 174-78, Appendix A 1a-6a. In accordance with this ruling, as previously noted, the Court instructed the jury that the option chosen by Ford for meeting the requirements of Standard 208 was not to be a basis for finding liability. See R. 167, Instruction No. 16, Apx. pg. 216, Appendix C at 15a. Nevertheless, the District Court ultimately upheld the jury verdict on the Plaintiffs' claims and was affirmed by the Court of Appeals. The Court of Appeals reviewed the preemption issue *de novo* in accordance with *GTE Mobilenet v. Johnson,* 111 F. 3d 469, 475 (6th Cir. 1997). See *King,* 209 F. 3d at 891, Ford's Appendix at A-21.

Further, the principle of conflict pre-emption on which *Geier* is based was well established by this Court by *1941* when this Court decided *Hines v. Davidowitz,* 312 U.S. 52, 61 S. Ct. 399, 85 L. Ed. 581 (1941), which was cited by *Geier.* As this Court stated in *Geier* (120 S. Ct. at 1921), quoting from *Hines:*

> This Court, when describing conflict pre-emption, has spoken of preempting state law that "*under the circumstances of th[e]*

> *particular case* . . . stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" -- whether that "obstacle" goes by the name of "conflicting; contrary to; . . . repugnance; difference; irreconcilability; inconsistency; violation; curtailment; . . . interference," or the like. *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). . . . [Emphasis added.]

The Court of Appeals in this case fully recognized the principle of conflict pre-emption as discussed in *Hines* and, in fact, cited the case, but nevertheless found the principle not applicable "under the circumstances of this particular case." The Court of Appeals expressly recognized the point of law definitively established by *Geier,* but did not find it applicable to this case. Specifically, the Court of Appeals stated (209 F. 3d at 891-92, Ford's Appendix at A-22 through A-24):

> The Secretary's Standard 208, promulgated pursuant to the Safety Act, requires passenger cars manufactured after September 1, 1989 but before September 1, 1993, like the Escort in this case, to comply with one of three front-seat-occupant crash-protection options: (1) a complete passive restraint system; (2) a passive system (automatic seat belts or air bags) for frontal crash protection, manual belts for lateral crashes and rollovers, and a warning system; or (3) manual front seat belts with a warning system. See 49 C.F.R. § 571.208, S4.1.4-S4.1.4.2.2. Ford used option 2 -- an automatic shoulder belt and knee bolster to

protect against frontal collisions, a manual lap belt to protect against lateral crashes and rollovers, and a warning system.

Ford's position is that implied conflict preemption applies in this case. It argues that "[b]ecause federal policy [i.e. the Safety Act and Standard 208] affirmatively required that these three options be available to manufacturers, a state rule which found civil liability for using one of the equipment options rather than another would be preempted." *State tort law removing one option would obviously be "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," namely the objective that manufacturers have flexibility in choosing a restraint system. Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S. Ct. 399, 85 L. Ed. 581 (1941). Ford contends that plaintiffs' suit would limit this flexibility, as the company characterizes plaintiffs' suit as one claiming that two-point, automatic seatbelts with manual lap belts are inherently defective. See *Irving v. Mazda Motor Corp.*, 136 F. 3d 764, 768-69 (11th Cir. 1998) (holding such a claim preempted).

We agree with plaintiffs, however, that Ford has misconstrued their case. As plaintiffs note:

> *In the case at bar . . . plaintiffs' position was not that the design choice made by defendants for protecting*

> *against frontal collisions -- an automatic shoulder belt and knee bolster -- was inherently defective but that the specific design was defective due to failure to use load limiters and/or change the location of the knee bolster and/or change the location of the belt anchor.*
>
> Such a claim is not preempted by the Safety Act. The FMVSS provide only the "minimum standard[s] for motor vehicle or motor vehicle equipment performance." 49 U.S.C. § 30102(a)(9). The Safety Act's savings clause, which states that compliance with an FMVSS does not shield a manufacturer from liability at common law, contemplates that manufacturers may be held liable for failure to exceed these minimum standards when their decisions were unreasonable. *This is the essence of plaintiffs' claims.* [Emphasis added.]

Thus, the Court of Appeals in this case recognized the precise point which this Court definitively established in *Geier* (120 S. Ct. at 1925), but found it not to be applicable to this case. The disagreement of the Court of Appeals with Ford's position was not with regard to *the law* but with regard to *the facts*. Plaintiffs submit that it is apparent that if the *Geier* case had been decided prior to the decision of the Court of Appeals in this case and had been brought to the Court's attention, it would have been distinguished. Thus, there would be no point in sending the case back to the Court of Appeals for further review.

Further, as the Court of Appeals noted in this case (209 F. 3d at 892-93, Ford's Appendix at A-24 and A-25), other federal courts have recognized the basis of distinction relied on in this case. Indeed, the case of *Irving v. Mazda Motor Corporation,* 136 F. 3d 764 (11th Cir. 1998), heavily relied on by Ford in the Courts below, also recognized the distinction. The Court stated (136 F. 3d at 768, fn. 4):

> If a claim was asserted that two-point systems (such as that installed in the Mazda MX6) were not defective in general but that the specific design selected by Mazda for its two-point system was unreasonably dangerous, pre-emption would be less clear.

Actually, the Plaintiffs submit that the case of *Freightliner Corporation v. Myrick,* 514 U. S. 280 (1995), is more significant in this case than *Geier.* In that case, this Court held (514 U.S. at 289) that there was no conflict preemption where there was "simply no federal standard for a private party to comply with." As previously noted, the various design changes that Plaintiffs' experts suggested were not covered by the regulations.

Ford's brief suggests that the summary ruling of the Court of Appeals in this case granting the motion to stay the mandate should be given significant consideration in this case. (Presumably, under Ford's reasoning, a summary decision to deny a stay of a mandate would be entitled to similar consideration.) However, this Court has recognized that such summary orders are often ambiguous. See, *e.g., Lords Landing Village Condominium Council of Unit Owners v. Continental Insurance Company,* 520 U.S. 893 (1997), in which a summary order of the Court of Appeals declining to recall its mandate was found to be ambiguous; and *Stutson v.*

United States, 516 U.S. 193 (1996), in which an order of the Court of Appeals summarily affirming the district court was found to be ambiguous. In the latter case, the Court stated that in the case of summary dispositions by courts of appeals, "it is rare that their basis for decision is entirely unambiguous." 516 U.S. at 196. In the case at bar, the fact that the Plaintiffs are protected by a supersedeas bond supplied at the time of the initial appeal plus the fact that there is no provision for the Plaintiffs to post such a bond to protect Ford if a stay were not granted may have been an important consideration in granting the stay.

Finally, Ford utilizes a concurring opinion of Justice Scalia in the case of *Thomas v. American Home Products, Inc.,* 519 U.S. 913, to suggest that the practice of GVRing is routine. This is an over simplification. First, as this Court stated in *Stutson, supra,* 516 U.S. at 197:

> Judicial efficiency and finality are important values, and our GVR power should not be exercised for "[m]ere convenience," *cf. Adams v. United States ex rel. McCann,* 317 U. S. 269, 274, 63 S. Ct. 236, 239, 87 L. Ed. 268 (1942).

Further, this Court has actually set a standard for deciding whether GVR is appropriate. See *Lawrence v. Chater,* 516 U. S. 163, 167 (1996), in which the Court stated the following:

> Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability* that the decision below rests upon a premise that the lower

> court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. [Emphasis added.]

In a case such as the case at bar, where the lower courts have demonstrated an understanding of the law as reflected by the intervening case, these considerations call for denying *certiorari*.

CONCLUSION

In conclusion, Ford has had all the days in court to which it is entitled. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/s/_____

Samuel E. Davies
Towne Square Place
230 Knox Street
Barbourville, KY 40906
(606) 546-5196
(606) 546-2441 (fax)

Attorney for Respondents

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

[Dated April 30, 1997]

No. 95-117

CHARLES KING, as administrator of the ESTATE OF PATTI ANN KING,
Plaintiff,

v.

FORD MOTOR COMPANY and MAZDA MOTOR COMPANY,
Defendants.

ASSOCIATED INSURANCE COMPANIES, INC.,
Intervening Plaintiff,

v.

FORD MOTOR COMPANY, MAZDA MOTOR COMPANY, and CHARLES KING, as administrator of the ESTATE OF PATTI ANN KING,
Intervening Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the court upon motion by the defendant, Ford Motor Company, for partial summary judgment (Record No. 57). The motion for partial summary judgment concerns the narrow issue of whether the National Traffic and Motor Vehicle Safety Act[1] ("Safety Act") and safety standards promulgated under authority of the Safety Act preempt a claim that an automobile is defective because it did not contain a passenger-side airbag. This issue has been fully briefed and is ripe for a decision on the pleadings.

FACTUAL SUMMARY

On August 21, 1994, the plaintiff's decedent, Patty Ann King, was a passenger in the right, front seat of a 1992 Ford Escort driven by her sister-in-law. Another passenger was seated in the right, rear seat behind Ms. King. The Escort in which Ms. King was riding collided with another vehicle. Ms. King died as a result of injuries sustained from the accident. The Escort's driver and the other passenger sustained minor injuries.

The front seat of the 1992 Ford Escort was equipped with two-point, motorized, "passive" shoulder belts and

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[1] 15 U.S.C.A. §§ 1381-1431 (West 1982). The Safety Act was repealed, retitled, and recodified in 1994. Act of July 5, 1994, Pub. L. No. 103-272, 108 Stat. 943 (codified at 49 U.S.C.A. § § 30101-30169 (West 1997)). References in this order are to the earlier Safety Act which was in effect when the 1992 Ford Escort was manufactured.

manual, "active" lap belts. There was no passenger-side airbag. At the time of the accident, Ms. King had not fastened her manual lap belt; she was restrained only by the shoulder belt. The plaintiff asserts that the shoulder belt inflicted the fatal injuries.

The plaintiff alleges, *inter alia,* that the 1992 Ford Escort was defective and unreasonably dangerous. One aspect of this alleged defective condition concerns the seatbelt system and the availability of safe alternatives -- for example, a passenger-side airbag. The defendant, Ford Motor Company, has moved for partial summary judgment to the extent that the Safety Act preempts plaintiff's claim that the 1992 Escort was defective because it did not have a passenger-side airbag.

ANALYSIS

Under authority of the Safety Act, the Secretary of Transportation establishes Federal Motor Vehicle Safety Standards ("FMVSS"). 15 U.S.C.A. § 1392(a) (West 1982); *Wood v. General Motors Corp.,* 865 F.2d 395 (1st Cir. 1988), *cert. denied,* 494 U.S. 1065 (1990). The FMVSS, Standard 208, for the 1992 Ford Escort allowed two options to meet Federal safety standards for crash protection of the front passenger: an airbag or seatbelt. 49 C.F.R. § 571.208, S4.1.2.1 (1992). The defendant contends that liability, under state tort law, for failure to provide an airbag to protect the front passenger is preempted by the Safety Act.

Based in Article VI of the Constitution, the preemption doctrine provides that the Federal constitution, laws, and regulations take precedence over those of the states. *Cipollone v. Liggett Group, Inc.,* 112 S.Ct. 2608, 2617

(1992). Preemption is applied judiciously, and only when indicated by "the clear and manifest intent of Congress." *Id.* Courts recognize either express or implied preemption. *Id.*

The Safety Act contains a preemption provision which states, in pertinent part, as follows:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State . . . shall have any authority either to establish . . . with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C.A. § 1392(d) (West 1992). The apparent straightforward intent of this passage -- that state safety standards yield to federal standards -- is complicated by a subsequent "savings clause" which states, "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C.A. § 1397(k) (West 1992).

The issue before this court then, is, if the FMVSS allows a manufacturer a choice of two options for crash protection, is a state cause of action that is predicated, even in part, on the manufacturer's choice of one option over the other, preempted by the express language of the statute or by the implied intent of Congress.

Numerous courts have held that the Safety Act does not expressly preempt "no-airbag" claims. See, e.g., *Courtney v. Mitsubishi Motors Corp.*, 926 F.Supp. 223, 224 (D. Mass. 1996); *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121 (3rd Cir.), *cert. denied,* 498 U.S. 853 (1990). *Wood v. General Motors Corp.*, 865 F.2d 395, 407 (1st Cir. 1988), *cert. denied,* 494 U.S. 1065 (1990). Thus, that portion of the defendant's argument fails.

Two recent cases before the Supreme Court addressed preemption issues, especially implied preemption: *Freightliner Corp. v. Myrick,* 115 S.Ct. 1483 (1995), and *Cipollone v. Liggett Group, Inc.*, 112 S.Ct. 2608 (1992). Implied preemption can be found when compliance with both the federal and state requirements is impossible, or when the state law is an obstacle to meeting federal objectives. *Myrick,* 115 S.Ct. at 1487. Even in light of the Supreme Court's recent articulations of preemption doctrine in *Cipollone* and *Myrick,* courts have found that "no-airbag" claims like that of the instant plaintiff are preempted. *See, e.g., Montag by Montag v. Honda Motor Co.*, 75 F.3d 1414, 1417 (10th Cir.), *cert. denied,* 117 S.Ct. 61 (1996); *Courtney v. Mitsubishi Motors Corp.*, 926 F.Supp. 223, 226 (D. Mass. 1996); *Waters v. Ford Motor Co.*, 1996 WL 114791, at *4 (E.D. Pa. Mar. 13, 1996). As these recent decisions confirm, the clear weight of authority is that any of plaintiff's claims that depend on failure to provide an airbag as evidence of a defective

product are preempted by federal law.[2] Thus, the court will grant the defendant's motion.

Accordingly, IT IS ORDERED that the defendant's motion for partial summary judgment is GRANTED.

This the 30th day of April, 1997.

/s/_____
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

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[2] However, this conclusion is not universal. To *Montag*, *Courtney*, and *Waters*, compare *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995) (finding that the savings clause explicitly preserves the common law-based "no-airbag" claim, and going on to find no implied preemption), and Kurt B. Chadwell, Comment, *Automobile Passive Restraint Claims Post-Cipollone: An End to the Federal Preemption Defense*, 46 Baylor L. Rev. 141 (1994) (reviewing the history of airbag regulations and the legislative history of the Safety Act, then concluding that common law airbag claims are not preempted).

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LONDON

[Filed April 14, 1995]

No. 95-117

CHARLES KING, AS ADMINISTRATOR OF THE ESTATE OF PATTI ANN KING *Plaintiff*,	)
v.	)
FORD MOTOR COMPANY and MAZDA MOTOR CORPORATION *Defendants*.	)

COMPLAINT

Comes the Plaintiff and, for his claim for relief against Defendants, states as follows:

JURISDICTIONAL ALLEGATIONS

1. Jurisdiction herein is founded on diversity of citizenship and amount.

2. That Plaintiff is the duly appointed Administrator of the Estate of Patti Ann King, having been so appointed on September 15, 1994, by Order of the Madison District Court. A copy of the Order is attached hereto as Exhibit A.

3. That the decedent, Patti Ann King, was at the time of her death and was at all times relevant herein a citizen and resident of the State of Kentucky.

4. That the Plaintiff, Charles King, as Administrator of the estate of Patti Ann King, is now and was at all times relevant herein a citizen and resident of the State of Kentucky.

5. That Defendant Ford Motor Company is now and was at all times relevant herein a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of Michigan. That Defendant Ford Motor Company has qualified to do business in the State of Kentucky, and its resident agent for service of process is C.T. Corporation System, Kentucky Home Life Building, Louisville, Kentucky 40202.

6. That Defendant Mazda Motor Corporation is now and was at all times relevant herein a corporation incorporated under the laws of Japan, having its principal place of business in Japan at 3-1 Shinchi, Fuchu-cho, Aki-gun, Hiroshima 730-91, Japan. That Defendant Mazda Motor Corporation has not qualified with the Secretary of State of the Commonwealth of Kentucky to do business in the Commonwealth of Kentucky.

7. That Defendant Mazda Motor Corporation is subject to service of process in this action pursuant to the terms and provisions of the Hague Convention.

8. That this Court has personal jurisdiction over each of the Defendants.

9. That the matter in controversy exceeds, exclusive of interest and costs, the sum of Fifty Thousand Dollars ($50,000.00).

SUBSTANTIVE ALLEGATIONS

10. That the Defendant Ford Motor Company, at all material times, was engaged in the business of designing or approving the design, manufacturing, assembling, testing, inspecting, marketing and selling a 1992 Ford Escort, vehicle identification number 3FAPP13J6NR103733 (herein referred to as the "Escort").

11. That the Defendant Mazda Motor Corporation, at all material times, was engaged in the business of designing or approving the design and testing of a 1992 Ford Escort, vehicle identification number 3FAPP13J6NR103733 (herein referred to as the "Escort").

12. That on August 21, 1994, in McKee, Jackson County, Kentucky, while decedent Patti Ann King was a front seat passenger in the Escort, the Escort was involved in a motor vehicle accident. That at the time and place aforesaid, the Escort failed to reasonably and adequately protect the decedent as a passenger, resulting in injuries to her which caused her death on August 29, 1994.

13. That the front passenger seat of the Escort was equipped with a seat belt assembly (herein referred to as the "restraint system") which consisted of an automatic shoulder belt with a manual lap belt. That Patti Ann King died as a result of injuries inflicted by the shoulder belt.

14. That the front passenger seat was not properly secured by its seat tracks, which failure substantially contributed to Patti Ann King's fatal injuries.

15. That as a result of the injuries to and death of Patti Ann King the estate of Patti Ann King should recover of the Defendants the following damages:

(a.) Medical and hospital expenses in the sum of $87,384.91;

(b.) Pain and suffering of Patti Ann King prior to death in the sum of $1,000,000.00;

(c.) Destruction of Patti Ann King's power to earn money in the sum of $2,500,000.00; and

(d.) Funeral and burial expenses in the sum of $5,461.00.

COUNT I

16. Plaintiff realleges and incorporates the allegations contained in paragraphs 10 through 15 above.

17. That the injuries to and the death of decedent Patti Ann King were a result of a defect in or the defective condition of the Escort, which was unreasonably dangerous, and of the failure to warn of the unreasonably dangerous defect or condition as designed, manufactured and sold, and therefore the Defendants, Ford Motor Company and Mazda Manufacturing Corporation, should be held strictly liable.

COUNT II

18. Plaintiff realleges and incorporates the allegations contained in paragraphs 10 through 15 above.

19. That at the time of design, manufacture and sale of the Escort the Defendants knew or should have known that the restraint system which automatically engaged the shoulder belt, but required the front seat occupant to manually attach the lap belt, was misleading and unreasonably dangerous. Defendants' failure to provide a restraint system which was reasonably safe constitutes negligent conduct and their failure to adequately instruct or warn the user of this restraint system of the need to manually attach the lap belt was negligent. In addition, the automatic shoulder belt induces the user to forget to attach the manual lap belt or to believe that the use of the manual lap belt is not necessary for the safe operation of the vehicle. Defendants knew, or in the exercise of reasonable care, should have known that front seat occupants of the vehicle would be unaware of the manual lap belt, be misled into believing that the manual lap belt was not necessary for safe use, or be induced into forgetting to attach the manual lap belt.

20. That the injuries to and death of decedent Patti Ann King were the result of the aforesaid negligence of Defendants Ford Motor Company and Mazda Motor Corporation.

COUNT III

21. Plaintiff realleges and incorporates the allegations contained in paragraphs 10 through 15 above.

22. That the injuries to and the death of the decedent Patti Ann King were the result of the breach by Defendant Ford Motor Company of its implied warranties that the Escort was fit for ordinary purposes for which automobiles are used.

23. That the injuries to and the death of the decedent Patti Ann King were the result of the breach by Defendant Ford Motor Company of its express warranties concerning the fitness and safety of the Escort.

WHEREFORE, Charles King, as Administrator of the estate of Patti Ann King, demands Judgment against the Defendants, Ford Motor Company and Mazda Motor Corporation, for the following sums:

(a.) Medical and hospital expenses in the sum of $87,384.91;

(b.) Pain and suffering of Patti Ann King prior to death in the sum of $1,000,000.00;

(c) Destruction of Patti Ann King's power to earn money in the sum of $2,500,000.00; and

(d.) Funeral and burial expenses in the sum of $5,461.00.

Total $3,592,845.91

WHEREFORE, the Plaintiff also demands **TRIAL BY JURY**, interest, costs, and all other just and proper relief.

/s/_____
ATTORNEY FOR PLAINTIFF

SAMUEL E. DAVIES
P. O. BOX 10
BARBOURVILLE, KY 40906
TELEPHONE: (606) 546-5196

CARL G. CUNNAGIN
P.O. BOX 155
McKEE, KY 40447
TELEPHONE: (606) 287-7732

APPENDIX C

JURY INSTRUCTIONS

INSTRUCTION NO. 13

In order to recover under her design defect claim, the plaintiffs must establish two essential elements, as follows:

> ***First,*** that when the 1992 Ford Escort left the possession of the defendants, the design of the automatic seat belt restraint system was defective and unreasonably dangerous to the consumer; AND
>
> ***Second,*** that the unreasonably dangerous, defective condition of the machine was a substantial factor in causing the injury and death of Patti King.

As the term is used in this instruction, a design is "defective and unreasonably dangerous" if it creates such a risk of accidental injury to a prospective user that an ordinarily prudent company engaged in the manufacture of similar products, being fully aware of the risk, would not have put it on the market.

INSTRUCTION NO. 14

The plaintiffs' second claim is for failure to warn. The plaintiffs claim that the defendants failed to use ordinary care to provide adequate directions for use and warnings of potential dangers associated with the restraint system in the 1992 Ford Escort.

In order for the plaintiffs to recover under this claim, the plaintiffs must prove the two elements, as follows:

> ***First,*** that the defendants failed to use ordinary care to provide adequate directions for use and warnings of potential dangers associated with the use, or reasonably foreseeable misuse, of the restraint system; AND
>
> ***Second,*** that the defendants' failure to provide adequate directions and warning was a substantial factor in causing the injury and death of Patti King.

INSTRUCTION NO. 16

Federal Motor Vehicle Safety Standard 208 specifically allowed manufacturers of 1992 model year vehicles to select any one of three approved options for restraint systems. As you have heard, the defendants chose to design this vehicle with one of those options -- that is, a restraint system that employed an automatic belt. The fact that the defendants chose this particular option is not evidence

that the vehicle was defectively designed, and you shall not consider it as such.

APPENDIX D

Federal Motor Vehicle Safety Standard

49 C.F.R. § 571.209

s 571.209 Standard No. 209; Seat belt assemblies.

. . .

S3. Definitions. . . .

"Load-limiter" means a seat belt assembly component or feature that controls tension on the seat belt to modulate the forces that are imparted to occupants restrained by the belt assembly during a crash.

. . .